

No. 90-1038

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1991

THOMAS CIPOLLONE, individually and as Executor
of the Estate of Rose D. Cipollone,

Petitioner,

v.

LIGGETT GROUP, INC., a Delaware Corporation; PHILIP
MORRIS INCORPORATED, a Virginia Corporation; and
LOEW'S THEATRES, INC., a New York Corporation,

Respondents.

On Writ Of Certiorari To The United States Court
Of Appeals For The Third Circuit

REPLY BRIEF OF PETITIONER

MARC Z. EDELL
Counsel of Record

BUDD LARNER

GROSS ROSENBAUM

GREENBERG & SADE, P.C.

Attorneys for Petitioner

150 John F. Kennedy Parkway

CN 1000

Short Hills, New Jersey 07078

(201) 379-4800

ALAN M. DARNELL

Of Counsel

WILENTZ, GOLDMAN

& SPITZER, P.C.

Attorneys for Petitioner

90 Woodbridge

Center Drive

P.O. Box 10

Woodbridge,

New Jersey 07095-9811

(908) 636-8000

TABLE OF CONTENTS

| | Page |
|--|------|
| TABLE OF AUTHORITIES | ii |
| INTRODUCTION | 1 |
| I. THE LABELING ACT DID NOT EXPRESSLY PREEMPT STATE COMMON LAW TORT SUITS | 3 |
| A. Plain Statement Analysis | 3 |
| B. Further Evidence Confirms Congress Did Not Intend to Preempt State Common Law Tort Actions | 7 |
| C. Defendants' View of Preemption Ascribes Absurd Designs to Congress | 10 |
| II. STATE COMMON LAW TORT SUITS DO NOT CONFLICT WITH THE PURPOSES OF THE LABELING ACT | 12 |
| A. A Favorable Jury Verdict Will Not Act as an Obstacle to the Accomplishment of the Label- ing Act's Secondary Purpose – to Avoid "Diver- se, Nonuniform, and Confusing Labeling and Advertising Regulations" | 12 |
| B. Congress Was Willing to Accept Any Ten- sion that Might Arise Between Common Law Tort Claims and The Labeling Act ... | 15 |
| III. THE ACT DOES NOT PREEMPT PLAINTIFF'S INTENTIONAL TORT CLAIMS | 18 |
| CONCLUSION | 20 |

TABLE OF AUTHORITIES

Page

CASES:

| | |
|--|--------|
| <i>Baker v. Liggett Group, Inc.</i> , 132 F.R.D. 123 (Mass. 1990)..... | 4 |
| <i>Banzhaf v. F.C.C.</i> , 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969) | 11, 14 |
| <i>Capital Broadcasting Co. v. Mitchell</i> , 333 F. Supp. 582 (D.D.C. 1971)..... | 15 |
| <i>Feldman v. Lederle Laboratories</i> , No. A-93, 1991 WL 135649 (N.J. July 24, 1991)..... | 8 |
| <i>Gianitsis v. American Brands</i> , 685 F. Supp. 853 (D. N.H. 1988) | 4 |
| <i>Gilboy v. American Tobacco Co.</i> , No. 90-C-2686, 1991 WL 110887 (La. June 21, 1991)..... | 4 |
| <i>Goodyear Atomic Corp. v. Miller</i> , 486 U.S. 174, 108 S. Ct. 1704 (1988) | 8 |
| <i>Gregory v. Ashcroft</i> , ___ U.S. ___, 111 S. Ct. 2395 (1991) | 1, 3 |
| <i>Herlihy v. R.J. Reynolds Tobacco Co.</i> , No. 85-3888-MA, 1988 WL 73434 (D. Mass. June 27, 1988) | 4 |
| <i>In the Matter of R. J. Reynolds Tobacco Co.</i> , No. 9206 (FTC Aug. 4, 1986) | 19 |
| <i>Ingersoll-Rand Co. v. McClendon</i> , ___ U.S. ___, 111 S. Ct. 478 (1990)..... | 9 |
| <i>Kotler v. American Tobacco Co.</i> , 926 F.2d 1217 (1st Cir. 1990) | 4 |
| <i>Lorillard v. Pons</i> , 434 U.S. 575 (1978) | 17 |
| <i>Motor Vehicle Mfrs. Ass'n v. Abrams</i> , 899 F.2d 1315 (2d Cir. 1990), cert. denied, 111 S. Ct. 1122 (1991) | 19 |

TABLE OF AUTHORITIES - Continued

Page

| | |
|---|--------|
| <i>Roysdon v. R.J. Reynolds Tobacco Co.</i> , 849 F.2d 230 (6th Cir. 1988)..... | 4 |
| <i>Salmon v. Parke, Davis and Co.</i> , 520 F.2d 1359 (4th Cir. 1975) | 14 |
| <i>Silkwood v. Kerr-McGee Corp.</i> , 464 U.S. 238 (1984) .. | 9, 17 |
| LEGISLATION: | |
| FEDERAL STATUTES | |
| 15 U.S.C. § 1331 et seq. | passim |
| 15 U.S.C. § 4401 et seq. | 15-17 |
| FEDERAL HEARINGS, REPORTS AND DEBATES | |
| 132 Cong. Rec. H247 (daily ed. Feb. 3, 1986) | 16 |
| Conf. Rep. No. 897, 91st Cong., 2d Sess. 12 | 6 |
| TREATISES: | |
| Restatement (Second) of Torts, § 288C..... | 8 |
| Restatement (Second) of Torts, § 388 | 8 |
| 2A C. Sands, Sutherland on Statutory Construc- tion (4th ed. 1973)..... | 17 |

INTRODUCTION

A reading of the Labeling Act alone or in conjunction with its legislative history makes it plain that Congress did not intend to preempt common law tort claims. Arguing to the contrary, defendants assert the unlikely proposition that without a word, Congress in 1965 eliminated all means of redress for those injured by cigarette manufacturers' tortious conduct. To support this perspective, they disregard fundamental aspects of the analytical framework this Court employs in its preemption jurisprudence.

First, they exclaim: "Petitioner's claims are barred under any theory of preemption - express or implied, field or conflict." Rspt. Br. 8. But because their argument fails scrutiny under any theory of preemption, they collapse the distinct tests into one repetitive refrain. This gestalt approach blurs the distinction between express and implied preemption and ignores the "plain statement" rule this Court recently endorsed in *Gregory v. Ashcroft*, ___ U.S. ___, 111 S. Ct. 2395 (1991).¹

Second, they reverse the presumption against preemption by shifting the burden to plaintiff to prove that Congress specifically intended to preserve these state common law tort actions. Rspt. Br. 25. Defendants have the test backwards. It is not our burden to convince this Court that the Act affirmatively allows state common law tort actions. Instead, it is their burden to demonstrate that Congress unquestionably intended to do away with them. This they cannot do.

¹ This decision is conspicuously absent from defendants' and their amici's briefs.

Further, defendants' preemption argument is based on several erroneous assumptions. First, they assert that a jury would declare the federally-mandated warning to be inadequate and dictate the additional warning language that must be included on cigarette packages and in advertising. To support this argument they mischaracterize the form and effect a jury's verdict would have in this case. Next, they fail to acknowledge that the Act does not constrain them from fulfilling their common law duty to warn by a variety of means other than by adding additional warning statements to cigarette packages and advertising. They also fail to recognize that a jury could easily find no fault with the federally-mandated warning yet conclude for other reasons (including defendants' concerted efforts to undermine the warning) that they failed to warn their consumers adequately of the health hazards of smoking. Finally, and perhaps most importantly, they disregard Congress' awareness of these common law tort suits and its acceptance of any possible tension that might arise between them and the Labeling Act.

In the end, defendants' argument is tied neither to the language nor to the history of the Act. Rather, it is an appeal to this Court to second-guess Congress' judgment in declining to write preemption of state common law into the Act. According to this plea, the Labeling Act must include the destruction of these claims if the statute is to make good sense. However, the wisdom of Congress is not at issue; at issue is whether Congress deliberately eliminated these common law tort claims.

I. THE LABELING ACT DID NOT EXPRESSLY PREEMPT STATE COMMON LAW TORT SUITS

A. Plain Statement Analysis

Any argument that the Labeling Act on its face expressly preempts state law damage actions is indefensible in light of the "plain statement" rule recently adopted by this Court in *Gregory v. Ashcroft*, ___ U.S. ___, 111 S. Ct. 2395 (1991), which assists in focusing the express preemption inquiry. The rule mandates that "it must be plain to anyone reading the Act" that Congress expressly displaced state law. *Id.* at 2404. This requirement of a clear statement of intent ensures that "[i]n traditionally sensitive areas, such as legislation affecting the federal balance . . . the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* at 2401 (citations omitted).²

To find express preemption here, it must be plain to anyone reading the Act that Congress "faced" the issue of the states' traditional right to afford a means of compensation to their citizens and decided to do away with it. A

² This rule acknowledges the basic structure of our government under which states retain sovereign powers that Congress will disturb only if necessary to accomplish its goals. *Id.* It is not limited to federal intrusion into the state's power to control its internal structure. Rather, it embodies principles of federalism applicable to all areas of traditional state control. Historically, states have provided a means of redress through common law tort systems to those injured by the irresponsible or socially unacceptable conduct of others. This Court is particularly solicitous of such traditional areas of state concern, and has been particularly reluctant to find an intent to alter those obligations in the absence of the clearest statement to the contrary.

review of the entire statute fails to reveal one word about state common law tort actions, let alone a clear unmistakable statement to do away with them.³ Without exception, every one of the over seventy judges who has examined the Act, including those who found conflict preemption, concluded that Congress did not expressly eliminate these common law tort claims.⁴ Even if one were to assume all these jurists are wrong, and it is uncertain whether Congress expressly displaced state tort law, we are left with ambiguity.⁵ "In the face of such ambiguity, . . . [this Court] will not attribute to Congress an intent to intrude on state governmental functions," and express preemption will not be read into the statute. *Gregory*, 111 S. Ct. at 2406.

The plain language of the Act reveals that Congress was only concerned with affirmative rulemaking that would:

³ See Pet. Br. 18-25; ACS Br. 16-19; Nat'l League Br. 6-10.

⁴ Typical of these rulings was the Court of Appeals' below: "In applying these [preemption] principles to the statutory scheme at issue here, we first express our agreement with the district court's conclusion that section 1334 does not provide for express preemption of the Cipollones' state common law claims." Pet. App. 102a. See Pet. Br. 14 n.16; *Kotler v. American Tobacco Co.*, 926 F.2d 1217 (1st Cir. 1990); *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988); *Baker v. Liggett Group, Inc.*, 132 F.R.D. 123 (Mass. 1990); *Herlihy v. R.J. Reynolds Tobacco Co.*, No. 85-3888-MA, 1988 WL 73434 (D. Mass. June 27, 1988); *Gianitsis v. American Brands*, 685 F. Supp. 853 (D. N.H. 1988); *Gilboy v. American Tobacco Co.*, No. 90-C-2686, 1991 WL 110887 (La. June 21, 1991).

⁵ The reams of pages and many authorities cited on both sides debating the definition of "requirement" may alone be proof that, at best, the Act's preemption language is ambiguous.

- (1) require additional specific warning statements *on* cigarette packages;⁶ and
- (2) require any specific warning statements *in* cigarette advertising.⁷

Thus, Congress excised a very narrow slice of traditional state police power – the power to dictate specific language relating to smoking and health on cigarette packages sold in the state and in cigarette advertising appearing in the state. The Act's Declaration of Policy in Section 2 confirms the problem Congress was concerned with was "diverse, nonuniform and confusing labeling and advertising *regulations*" and not the broader application of common law tort principles (emphasis added).⁸

Recognizing that it is impossible to read the preemptive reach of the original language of Section 5(b) to

⁶ Section 5. (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.

Pub. L. No. 89-92, 79 Stat. 282, codified as amended at 15 U.S.C. § 1334.

⁷ Section 5. . . . (b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Id.

⁸ Pub. L. No. 89-92, 79 Stat. 282, codified at 15 U.S.C. § 1331. See Pet. Br. 2 for reprint of this section. Apparently realizing that Congress' use of the word "regulations" in this Declaration of Policy undermines their preemption argument, defendants drop the word from their continual quotation of Section 2's "diverse, nonuniform and confusing" language. In lieu of "regulations," they substitute the words "regulation," "marketing conditions," or "obligations." Rspt. Br. 10, 36.

include common law tort claims, defendants ignore it and rely solely on the seemingly broader reach of the 1969 amendment.⁹ Amended Section 5(b) preempted affirmative rulemaking that would result in "requirement[s] or prohibition[s] based on smoking and health" with respect to the "advertising or promotion" of cigarettes.¹⁰ It did not signal an intent by Congress to expand the preemption section of the Act to include common law tort claims.¹¹ Rather, it was the result of Congress' desire to clarify that "[t]his preemption [provision] is intended to include not only action by State statute but by all other administrative actions or local ordinances or regulations by any political subdivision of any State." Conf. Rep. No. 897, 91st Cong., 2d Sess. 12, *reprinted in* 1970 U.S. Code Cong. & Admin. News 2676, 2677.¹²

Because defendants cannot disprove what is self-evident – that Congress did not expressly preempt these

⁹ See, e.g., Rspt. Br. 30-31 (quoting only "no requirement or prohibition" language from advertising provision 5(b) in discussion of failure to warn claim); see also *id.* at 18, 24, 25, 40.

¹⁰ Pub. L. No. 91-222, 84 Stat. 87, codified at 15 U.S.C. § 1334(b).

¹¹ The reasons for the amendment were wholly unrelated to common law tort actions. Congress amended Section 5(b) in order to prevent intrusions planned by the FCC, the FTC, and states to regulate or ban cigarette advertising, and because of heated debate concerning whether the 1965 Act's language actually prohibited a ban on advertising. See Nat'l League Br. 17-19.

¹² The language so reflects: Section 5(b) prohibits any "requirement or prohibition *based on* smoking and health." (Emphasis added). It leaves untouched personal injury actions *based on* generic common law duties to present information truthfully and to refrain from fraudulent activity.

suits in 1965 – they must establish that Congress abruptly changed course in 1969 in amending Section 5(b), something they utterly fail to do. In fact, they effectively concede that Congress did not expand the scope of the Act in the 1969 amendment. See Rspt. Br. 23 n.28.

Defendants' express preemption argument is based on their assertion that their common law duty to warn requires them to include additional warning language on cigarette packages and in advertising, to the exclusion of all other conduct. This is plainly not so. Defendants' duty may be fulfilled in myriad ways. Should they wish to furnish their consumers with complete and accurate information of the health hazards of smoking, they could, for example, employ public health announcements in television and print media, advertorials, or educational materials such as pamphlets, none of which implicates the warning label on cigarette packages or in cigarette advertising. See Six Former Surgeons General Br. 10-15.

B. Further Evidence Confirms Congress Did Not Intend to Preempt State Common Law Tort Actions

Beyond the plain language of the Act, a multitude of other indicators confirm that Congress never intended to eliminate the states' ability to afford their citizens a means of redress for the tortious conduct of the cigarette manufacturers. First, the Act's legislative history reveals Congress knew of these tort actions and took no steps to do away with them. See Pet. Br. 32-36. Although defendants contend that references in the legislative history to these suits are few, and appear only in hearings and floor debates, mention of common law suits was actually relatively frequent. Nat'l League Br. 19, n.12. In any event, the claims were not a major source of dispute simply because Congress never considered preempting them

and no one (including the cigarette companies) believed otherwise.¹³

Second, even without these clear references in the hearings and debates reflecting Congress' awareness and tolerance of these common law tort actions, it is a well-established presumption that when Congress acts, it is aware of the current state of the law.¹⁴ It is fanciful to suggest that Congress was unaware of the general common law tort principle that a manufacturer owes a duty to its customers to inform them adequately of the health hazards of its products. Restatement (Second) of Torts § 388. Further, at the time Congress was considering the original Labeling Act, there had already been a number of

¹³ Defendants attempt to distance themselves from their own witnesses by pleading that Joseph F. Cullman III's testimony that these suits would be unaffected by the Act must be discounted because he was not a lawyer. Rspt. Br. 43 n.50. See 1969 Hearings 597-600. Not only was he the CEO and Chairman of the Board of Philip Morris and Chairman of the Board of The Tobacco Institute (the industry's trade association), he was also designated as the industry's spokesperson to Congress on all aspects of the bill, including the issue of preemption. At no time during his testimony did he request preemption of these suits on the cigarette industry's behalf. Pet. Br. 30, n.33.

¹⁴ *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 108 S. Ct. 1704, 1711-12 (1988). It should also be noted that before the Court of Appeals' decision in this case, other federally-mandated warning requirements had always been considered the floor, not the ceiling, of a manufacturer's common law duty to convey to its consumers the nature and extent of the health hazards of its products. E.g., Restatement (Second) of Torts § 288C; *Feldman v. Lederle Laboratories*, No. A-93, 1991 WL 135649 (N.J. July 24, 1991) (FDA requirements do not preempt state common law failure to warn claims against pharmaceutical manufacturers). Until the Court of Appeals' ruling in this case, no product manufacturer was ever exempted from this common law duty common to all industries.

trials and reported decisions in cases brought by injured smokers against cigarette manufacturers. See Pet. Br. 32, n.39. These facts also lay to rest defendants' claim that because Congress could not anticipate every possible impediment to its scheme, it painted preemption with a broad brush.

Third, the absence of any compensatory provision for injured smokers in the Act is further evidence that Congress never intended to do away with these product liability claims. Undoubtedly, Congress could have eliminated all means of redress but "[i]t is difficult to believe that Congress would, *without comment*, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) (emphasis added). Further, because the Labeling Act contains no exclusive or alternative remedy provision, it lacks the kind of "special features warranting preemption" this Court found so persuasive for preemption under ERISA in *Ingersoll-Rand Co. v. McClendon*, ___ U.S. ___, 111 S. Ct. 478, 485 (1990), a case heavily relied on by defendants.¹⁵

Finally, Congress' willingness to permit defendants to say more about the health hazards of smoking evinces its intent to permit these suits to continue. A critical question left unanswered by defendants is why Congress permitted cigarette manufacturers to provide consumers with additional information concerning the health

¹⁵ Defendants' amicus states: "the Labeling and Advertising Act does contain effective alternative remedies." PLAC Br. 3. Such a statement goes beyond disingenuous. The Act provides no compensatory remedy to injured smokers. It only provides for criminal penalties and injunctive proceedings for violations of the Act brought by the Attorney General. See 15 U.S.C. §§ 1335-36.

hazards of their products. It is absurd to presume Congress left the cigarette industry free to say more so it could embark on a scheme to neutralize or cast doubt on the federal health warning. More likely, Congress gave cigarette manufacturers the discretion to decide how and whether to provide additional information to their consumers regarding the health hazards of smoking because cigarette manufacturers are in the best position to determine how to allow consumers to make an informed decision about smoking – the very discretion all manufacturers must exercise reasonably to fulfill their common law duty to warn.¹⁶

C. Defendants' View of Preemption Ascribes Absurd Designs to Congress

We concur with defendants' *amicus* that "courts should strive to avoid attributing absurd designs to Congress, particularly when the language of the statute and its legislative history provide little support for the proffered counterintuitive reading." PLAC Br. 5. Ironically, however, it is the cigarette industry's view of preemption that ascribes to Congress the following absurd views, goals and intent:

- Congress, without comment, eliminated all means of redress for those injured by a manufacturer's tortious conduct – an event unique in Congressional history.

¹⁶ Cigarette manufacturers have exercised this freedom of choice in favor of the financial bottom line. They decided it was more profitable to approach the cigarette smoking and health issue, as they have, with the understanding that if they were held accountable they would build such costs into the price of the product and go on with business as usual.

- Congress, without comment, eliminated cigarette manufacturers' common law duty to warn.
- Congress, without comment, eliminated cigarette manufacturers' liability for their intentional misconduct, including false advertising, suppressing research results, and withholding new and important information on the health hazards of cigarette smoking.
- Congress permitted cigarette manufacturers to say more to their consumers regarding cigarette smoking and health, not to inform them but rather to neutralize the effect of Congress' warning.
- Congress was worried that if cigarette manufacturers provided additional information about the true nature and extent of the health hazards of cigarette smoking, the American public would learn too much, purchase fewer cigarettes and, consequently, the national economy would suffer.¹⁷

The most cynical critic would not attribute the above to Congress, especially in light of its goals in enacting the Act¹⁸ and the fact that even the cigarette industry was not so bold as to ask for such broad preemption. Nevertheless, defendants expect this Court to impute these very designs to Congress.

¹⁷ See *Banzhaf v. F.C.C.*, 405 F.2d 1082, 1089 (D.C. Cir. 1968), *cert. denied*, 364 U.S. 842 (1969) (construing Labeling Act):

Accordingly, if we are to adopt [cigarette manufacturers'] analysis, we must conclude that Congress legislated to curtail the potential flow of information lest the public learn too much about the hazards of smoking for the good of the tobacco industry and the economy. We are loathe to impute such a purpose to Congress absent a clear expression.

¹⁸ See ACS Br. 6-13; Nat'l League Br. 12-22; Pet. Br. 27-32.

II. STATE COMMON LAW TORT SUITS DO NOT CONFLICT WITH THE PURPOSES OF THE LABELING ACT

A. A Favorable Jury Verdict Will Not Act as an Obstacle to the Accomplishment of the Labeling Act's Secondary Purpose - to Avoid "Diverse, Nonuniform, and Confusing Labeling and Advertising Regulations"

Defendants do not contend it is physically impossible to pay money damages resulting from these suits and comply with the labeling and advertising requirements of the Act, nor do they suggest it is physically impossible to provide additional information to their consumers regarding the health hazards of their products and comply with the requirements of the Act. The essence of their conflict argument, therefore, is that a jury verdict finding that (1) cigarette manufacturers failed to convey adequately to its consumers the health hazards of cigarettes or (2) cigarette manufacturers intentionally withheld information from or misled consumers, would act as an obstacle to the accomplishment of the Act's secondary purpose (to avoid nonuniform labeling and advertising regulations).¹⁹

Defendants confuse the conflict issue. They suggest such a verdict would permit six amateurs to second-guess Congress, and would result in regulations specifying additional language that must be included on cigarette packages and in advertising. However, this depiction

¹⁹ As noted previously, Congress' primary purpose in enacting the Act was to inform the public of the hazards of cigarette smoking, a goal fully consistent with tort suits. See Pet. Br. 39-40; Nat'l League Br. 29, n.24.

of how a jury works, and what a jury says, is a transparent attempt to transform jurors into what they are not - legislators. Unlike the legislature, the jury does not decide the wording used on the labels. All a jury will decide is whether cigarette manufacturers, in light of all attendant circumstances, afforded their consumers a full and accurate appreciation of the hazards of their products. If not, the jury will return an adverse verdict and defendants must pay. The jury will not, however, dictate additional warning language for cigarette packages or advertising, nor will it prescribe the manner in which the cigarette manufacturers should or should not advertise their products.

The suggestion that one state, through a verdict, "might require certain information that another state [through another jury verdict] prohibits as misleading, unproven, or superfluous, thereby leaving cigarette manufacturers without any single warning label that can be used across the country" (PLAC Br. 28), typifies defendants' grave misunderstanding of how juries work. Their first mistake is failing to see that a jury verdict in state one will never say: "You are liable because you must say 'X' and you shall convey that message by means 'Y'," or "You should have said 'X' and you should have conveyed that message by means 'Y'." All the jury will say is: "You failed to warn adequately; therefore, you must pay money damages." Defendants' error is compounded by their suggestion that the jury in state two would see and evaluate the nonexistent directive of state one's jury and then make a specific finding that the language ordained by the first jury was "misleading, unproven, or superfluous." This portrayal denies the jury's mandate: to consider all the evidence, including defendants'

communications and conduct, as well as the federal warning label, and decide whether the cigarette manufacturers fulfilled their duty to warn their customers adequately about their products.²⁰

Moreover, a jury finding that cigarette manufacturers failed to warn consumers adequately of the hazards of smoking would not necessarily mean that the jury found the federal warning to be lacking. It may very well be that had defendants not taken steps to neutralize or otherwise detract from the effectiveness of the health warnings, the warning standing alone would have adequately conveyed to the public the health hazards of cigarette smoking.²¹

Finally, if cigarette manufacturers decide to limit their exposure in the future because of adverse jury verdicts, Congress has left them free to do so.²² Consistent

²⁰ See *Banzhaf*, 405 F.2d at 1090:

Congress may reasonably have concluded that a warning on each pack was adequate *warning*. It surely did not think the warnings were themselves adequate *information*. And we find no sufficiently persuasive evidence that Congress hoped to impede the flow of adequate information for fear that, if the public knew all the facts, too many of them would stop smoking. (emphasis in original).

²¹ See e.g., *Salmon v. Parke, Davis and Co.* 520 F.2d 1359, 1362 (4th Cir. 1975) ("[O]verpromotion of the drug may erode the effectiveness of otherwise adequate warning.").

²² See *supra* discussion at 7. Defendants could even petition Congress to change the language of the warning label. Apparently, they have never been reluctant to do so in the past

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with their past practice, however, they will probably do nothing. Aside from vague allusions as to what other manufacturers might do, defendants have never stated they would do anything in response to adverse verdicts other than build the expense into the price of their product. In fact, they have consistently stated these suits will have no material effect on their financial well-being. See Pet. Br. 42-43 & n.47.

B. Congress Was Willing to Accept Any Tension that Might Arise from these Common Law Tort Claims

In addition to Congress' awareness of these suits at the time it enacted the Labeling Act, a number of other factors reflect Congress' willingness to accept any tension that might arise from these lawsuits. Defendants contend it is "implausible" and "bizarre" to think Congress would have enacted legislation, crafted the precise language of the warning, and yet left intact cigarette manufacturers' state common law duties to their citizens. Rspt. Br. 40, 46. To the contrary, there is nothing implausible about it.

Perhaps the clearest evidence that such a proposition is perfectly plausible is found in the Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 4401. The Smokeless Act, which requires

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when it best served their interest. See, e.g., *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582, 589 (D.D.C. 1971) ("The passage of the Public Health Cigarette Smoking Act of 1969 marked a dramatic legislative *coup* for the tobacco industry.") (emphasis in original).

warning labels on smokeless tobacco products, employed as its blueprint the Cigarette Labeling Act. Although the Smokeless Act has no "Declaration of Policy" section, its legislative history reveals that Congress had the same two concerns it had when it enacted the Labeling Act: to educate the public of the dangers of smokeless tobacco; and to protect the national economy against conflicting labeling and advertising requirements. 132 Cong. Rec. H247 (daily ed. Feb. 3, 1986) (Statement by Rep. Waxman, co-sponsor of the bill).²³

To facilitate its second purpose, Congress incorporated a preemption provision similar to the one in the Labeling Act: "No statement relating to the use of smokeless tobacco products and health . . . shall be required by any State or local statute or regulation to be included on any package or in any advertisement." 15 U.S.C. § 4406(b). Congress also included a savings clause in the Act: "Nothing in this Act shall relieve any person from liability at common law or under statutory law to any other person." 15 U.S.C. § 4406(c).²⁴

²³ The Smokeless Tobacco Council endorsed the Act, reiterating the necessity of "avoid[ing] the myriad of problems attendant with warning labels promulgated by various state legislatures or federal or state agencies." *Id.* (letter by Michael Kerrigan, President, Smokeless Tobacco Council, to Rep. Waxman, Jan. 27, 1986).

²⁴ Defendants suggest that Congress would have incorporated a similar savings clause in 1965 had it intended to preserve these common law tort claims. This argument is woefully deficient. First, given the presumption against preemption, this Court must find evidence that Congress intended to preempt common law, not evidence that it meant to preserve it. Second, at the time it considered the Smokeless Act, Congress

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Thus, in the Smokeless Act, Congress did the "unthinkable" – it concluded that common law claims premised on inadequate warning and intentional misconduct can coexist with the labeling and advertising requirements of the Smokeless Act. There is no reason to believe common law tort claims cannot similarly coexist with the Labeling Act. Without exception, Congress has been willing to accept the tension between federal acts and common law tort actions where Congress has decided not to become involved in the compensation issue by providing (or simply not precluding) some alternative means of redress to the injured victim. *See, e.g., Silkwood*, 464 U.S. at 256.

In part, defendants' incredulity that Congress would have permitted these suits to go forward stems from their skewed perspective of the jury system. They fail to recognize that jurors have been entrusted with deciding questions far more sophisticated than the ones presented here to the satisfaction of Congress and this Court – jurors in *Silkwood* evaluated the safety of nuclear facilities.

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knew of the various lower court decisions erroneously construing the preemption section of the Labeling Act. Congress wanted to ensure that similar error was not made in interpreting the Smokeless Act, and so it stated in plain unmistakable terms in a savings clause that the preemption language of the Act was not intended to preempt state tort law suits. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change."); 2A C. Sands, Sutherland on Statutory Construction § 49.09 and cases cited therein (4th ed. 1973).

Certainly, jurors are at least as well equipped to decide whether defendants adequately conveyed to consumers the health hazards of smoking as how to run a nuclear facility safely. Jurors are average consumers. They are probably in the very best position to decide whether manufacturers met their common law duties to their customers.

III. THE ACT DOES NOT PREEMPT PLAINTIFF'S INTENTIONAL TORT CLAIMS

Notably, defendants do not deny engaging in the intentional misconduct described in our initial brief. They nonetheless seek refuge for their tortious conduct in the same preemption argument offered on the duty to warn claim. Not only do the same deficiencies found in their duty to warn argument follow them here, but defendants also ignore the obvious differences between a claim based on what they failed to do and one based on their affirmative efforts to undermine Congress' goals.²⁵

²⁵ In a final effort to preempt petitioner's intentional tort claims, defendants assert that the power of the Federal Trade Commission to halt false advertising confirms the comprehensive nature of the federal scheme in that it provides an "alternative remedy" for defendants' tortious conduct. This argument fails on all accounts.

First, the FTC has never had any power to afford compensation to those injured by false and misleading advertising. Thus, an FTC cease and desist order would leave injured smokers with no damages remedy. Second, the Labeling Act gave the FTC no new authority. In fact, Congress preempted some of the FTC's traditional powers in the original Act and then reinstated some through the 1969 amendment. Moreover, the Act never directed the FTC to do anything other than report to Congress on the effectiveness of the Labeling Act. It provided the FTC with no new regulatory control over the warnings, their effectiveness, or cigarette advertising.

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Most significantly, defendants fail to acknowledge that most of their activities that serve as the basis for Mrs. Cipollone's intentional wrongdoing claims are, by their own admission, activities and communications outside the scope of the Act. For example, the industry's scheme to neutralize the effectiveness of the federally-mandated health warning was accomplished through public relations efforts and public statements of their trade associations, such as the Tobacco Industry Research Council, The Tobacco Institute, and the Council for Tobacco Research. These communications took various forms, all of which defendants considered to be non-product advertising or promotion, as evidenced by the fact that none of them carries the federally-mandated warning. See e.g., J.A. 42, 72, 76, Pet. App. 227a. In fact, they have argued staunchly against any interference with such speech.²⁶ In addition, defendants have issued press releases both directly and through experts, have had stories ghost-written for them questioning the relationship between cigarette smoking and health, and have taken out advertorials contesting the relationship between smoking and health (J.A. 42, 72), all under the guise of "free noncommercial speech," or at least speech outside the purview of the Act.

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Third, no court has held that an FTC finding that a particular communication is false and misleading preempts state law tort claims based on the same communications. Indeed, even in the warranty area, where the FTC's power has been statutorily augmented, no preemption has been found. See, e.g., *Motor Vehicle Manufacturers Ass'n v. Abrams*, 899 F.2d 1315 (2d Cir. 1990), cert. denied, 111 S. Ct. 1122 (1991) (Solicitor General supporting no preemption).

²⁶ *In the Matter of R. J. Reynolds Tobacco Co.*, No. 9206 (FTC Aug. 4, 1986).

The cigarette industry cannot have it both ways. It cannot speak in a form claimed to be unconstrained by the Act yet assert the Act as a preemptive shield for the very same conduct.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

MARC Z. EDELL

Counsel of Record

BUDD LARNER GROSS ROSENBAUM

GREENBERG & SADE, P.C.

Attorneys for Petitioner

150 John F. Kennedy Parkway

CN 1000

Short Hills, New Jersey

07078-0999

(201) 379-4800

On the Brief

MARC Z. EDELL

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